

UNITED STATES COPYRIGHT ROYALTY JUDGES  
The Library of Congress

**In the Matter of:**

**DETERMINATION OF ROYALTY RATES  
AND TERMS FOR MAKING AND  
DISTRIBUTING PHONORECORDS  
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR  
(2023-2027)**

**EXPEDITED JOINT MOTION FOR SUSPENSION OF VOLUNTARY NEGOTIATION  
PERIOD AND SUBSEQUENT CASE EVENTS AND DEADLINES**

Google LLC, Spotify USA Inc., Pandora Media, LLC, the National Music Publishers' Association, Nashville Songwriters Association International, and George Johnson (collectively, "Joint Movants")<sup>1</sup> respectfully move the Judges (the "Joint Motion") for a suspension of the Voluntary Negotiation Period ("VNP") and subsequent case events in the above-referenced proceeding (the "Proceeding") to allow the parties to receive and consider the Judges' Initial Determination in the *Phonorecords III* remand proceeding (the "Remand Determination") before substantive litigation begins in this Proceeding. Such a suspension would promote productive settlement discussions and substantially increase efficiency in litigating this Proceeding.

In particular, Joint Movants request that the VNP be suspended immediately and remain suspended until the day following the issuance of the Remand Determination. Joint Movants further propose that the remaining time in the VNP resume immediately following the issuance of the Remand Determination, that the deadline to file Written Direct Statements be continued to a date 150 days after the end of the VNP, and that subsequent case events and deadlines in this

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<sup>1</sup> Apple Inc. and SoundCloud Operations Inc. consent to this motion and the relief requested herein. Brian Zisk was presented with a draft of this Joint Motion and has not responded to a request for comment.

Proceeding be similarly continued by 150 days.<sup>2</sup> To avoid prejudice, Joint Movants further request that the Judges confirm in the order that the rates and terms set by this Proceeding will be effective from January 1, 2023, regardless of when the final determination in this Proceeding is published in the Federal Register.

Since the VNP expires on May 13, if the Judges find that resolution of this motion will require deliberation beyond this date, Joint Movants respectfully request that the Judges suspend the VNP on an interim basis pending resolution of this motion, to avoid any potential of mooted of the motion by virtue of the conclusion of the VNP. Joint Movants are also prepared to join a teleconference with the Judges to aid expeditious resolution of this motion prior to the scheduled conclusion of the VNP.

A Proposed Order for the requested relief accompanies this motion.

#### **I. GOOD CAUSE EXISTS TO GRANT THE REQUESTED SUSPENSION**

The Judges have authority to vary the schedule for this Proceeding for good cause. *See* 17 U.S.C. § 801(c) (“The Copyright Royalty Judges may make any necessary procedural... rulings in any proceeding under this chapter...”); 17 U.S.C. § 803(b)(3)(A)(ii) (“The initiation of a voluntary negotiation period among the participants shall be set at a time determined by the Copyright Royalty Judges.”); 17 U.S.C. § 803(b)(6)(C)(ii)(I) (“the Copyright Royalty Judges, after taking into consideration the views of the participants in the proceeding, shall determine a schedule for conducting and completing discovery.”); Case Scheduling Order at 3 (“At any time, a participant may file a motion stating good cause to vary the schedule. . . .”).

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<sup>2</sup> Appendix A to this Joint Motion compares the dates set forth in the February 9, 2021 Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order (“Case Scheduling Order”) to the dates requested by Joint Movants.

The requested suspension is consistent with the statute as it does not extend the three-month length of the VNP laid out in the statute, but simply suspends that period during the pendency of the *Phonorecords III* remand, with the remainder of the VNP to run after delivery of the Remand Determination. Suspension of the VNP is permitted as the statute does not require the VNP to run for three consecutive months or to end three months after it begins. *Compare* 17 U.S.C. § 803(b)(3)(B) (“[t]he voluntary negotiation period... shall be 3 months”) *with* 17 U.S.C. § 803(b)(3)(B) (written direct statements “shall be filed by a date... which... may be not earlier than 4 months, and not later than 5 months, after the end of the [VNP].”)

Good cause exists to grant the requested suspension because doing so would promote productive settlement discussions and substantially increase efficiency in the litigation of this Proceeding.

First, the requested suspension of the VNP to after the issuance of the Remand Determination would allow for more productive settlement discussions. Knowledge of the outcome of the *Phonorecords III* remand will allow participants to assess settlement proposals in a more productive and meaningful manner because the parties will be able to take into account the rates and terms from the prior proceeding as well as the Judges’ additional findings and conclusions that are to be made in that proceeding.

Second, it would be significantly more efficient to litigate the instant Proceeding after the issuance of the Remand Determination. The Judges are bound to act in accordance with their prior determinations, including the Remand Determination that will be issued. *See* 17 U.S.C. § 803(a)(1) (“The Copyright Royalty Judges shall act in accordance with . . . prior determinations and interpretations of the . . . Copyright Royalty Judges. . . .”). Litigating this Proceeding without knowledge of the outcome of the prior proceeding would make it much more difficult for the

parties to present the evidence that will be the most helpful to the Judges in this Proceeding. The further prospect of the issuance of the Remand Determination in the midst of, or after, substantive submissions in this Proceeding, could lead to pressures surrounding amendments of rate proposals and supplemental submissions that may be impossible to accommodate in an orderly manner given the strict statutory timetables in place after the Voluntary Negotiation Period had ended. These important concerns with running in parallel two proceedings that were designed to run consecutively can be avoided by the temporary suspension of the Voluntary Negotiation Period, to bring the litigation of this Proceeding back in line with how it was envisioned by the statute.

## **II. THE REQUESTED SUSPENSION WOULD NOT BE PREJUDICIAL**

The proposed change to the schedule would not be prejudicial, but is rather the means to avoid potential prejudice from parallel litigation of two *Phonorecords* proceedings. The proposed change would promote the Judges' ability to conduct an orderly proceeding and receive relevant and useful testimony and other evidence. The Judges would be afforded the same time to deliberate and render a timely decision,<sup>3</sup> and the noticed effective dates of the rates and terms would be maintained, thereby avoiding prejudice with respect to ultimate royalty payments.

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<sup>3</sup> Joint Movants do not read 17 U.S.C. § 803(c)(1) to require an initial determination in this Proceeding to issue by a particular date due to expiration of previous rates, because *Phonorecords* rates and terms do not expire by statute. Compare 17 U.S.C. § 803(d)(2)(A) (referring to cases “[w]hen *this title provides* that the royalty rates and terms that were previously in effect are to expire on a specified date . . .”) with *id.* § 803(d)(2)(B) (referring to “other cases where rates and terms do not expire on a specified date”). Section 115 rates and terms do not expire by statute, in contrast to Section 114 rates and terms that do expire by statute. Compare 17 U.S.C. § 804(b)(3) with § 804(b)(4). However, in the event there was any concern over ambiguity concerning this provision, Joint Movants respectfully propose that the Judges can clarify in the Remand Determination that the rates and terms therein do not “expire on a specified date,” but rather are effective from 2018 until superseded by the *Phonorecords IV* rates and terms, which will apply as of January 1, 2023.

Joint Movants believe that the requested suspension will only delay resolution of this Proceeding by a few months. However, the potential for the Remand Determination to take longer than expected only heightens the importance of the relief requested here. It would be more prejudicial for this Proceeding to move ahead towards direct statement, rebuttal and hearing phases without the participants knowing the outcome of the *Phonorecords III* remand and thus the final rates and terms in effect prior to those to be set in this Proceeding.

The proposed schedule would not prejudice the orderly flow or outcomes of royalty payments. The January 1, 2023 effective date of the rates and terms in this Proceeding would be maintained, and for any interim period pending the publication of the final determination in this proceeding, the rates and terms previously in effect will operate as interim royalty rates and terms, subject to adjustment when the new rates and terms are established (as is presently occurring in connection with the remand).<sup>4</sup> The Judges unequivocally have the authority to maintain January 1, 2023 as the effective date for the rates and terms to be determined in this Proceeding regardless of the date of publication in the Federal Register of the final determination in this Proceeding.<sup>5</sup> See 17 U.S.C. § 803(d)(2)(B) (providing for effective dates “as otherwise provided... by the

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<sup>4</sup> Nor would the operational implementation of adjustments to royalty payments, if necessary, result in any prejudice. Adjustments have been made in the past, and the establishment of the Mechanical Licensing Collective and Digital Licensee Coordinator further provide for adjustment processes and timing to be worked out in a reasonable and uniform manner, with which Joint Movants will cooperate.

<sup>5</sup> Joint Movants understand that Amazon.com Services LLC (“Amazon.com”) does not at present support setting January 1, 2023, as the effective date for rates and terms to be set in this Proceeding if such an effective date results in the retroactive application of rates and terms. Joint Movants submit that the Joint Motion should be granted notwithstanding Amazon.com’s position, in view of the significant benefits it will confer, and prejudice it will avoid, as discussed herein, and the broad support that the Joint Motion has among the participants.

Copyright Royalty Judges”). This ensures that the updated rates and terms in this Proceeding will apply as of the date initially intended by the Judges.

Joint Movants believe that the proposed schedule is more efficient, more orderly, will lead to a better presentation of evidence for the Judges, and will avoid the pitfalls of running this Proceeding in parallel with a proceeding that the statute explicitly designed to conclude in advance of this Proceeding.

### **III. CONCLUSION**

For the reasons set forth above, good cause exists to grant the requested suspension of the Voluntary Negotiation Period and subsequent case events and deadlines. Accordingly, Joint Movants respectfully request that the Joint Motion be granted.

Respectfully submitted,

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/s/ George Johnson

George Johnson

*Appearing pro se*

Dated: May 6, 2021



## Appendix A

Case Event	Date Set Forth in Case Scheduling Order	Proposed Date <sup>6</sup>
Initiation (publication in FR)	January 5, 2021	(No change)
Deadline for petitions to participate	February 4, 2021	(No change)
Commencement of Voluntary Negotiation Period	February 12, 2021	(No change)
End of Voluntary Negotiation Period	May 13, 2021	First day following issuance of the Initial Determination in the <i>Phonorecords III</i> remand proceeding
Parties' Notice Regarding Settlement	May 18, 2021	5 days after End of Voluntary Negotiation Period
<b>If Parties Do Not Settle:</b>		
Exchange of Preliminary Disclosures	[timing and substance subject to negotiation between participants]	(No change)
Non-Settling Parties file Written Direct Statements Commencement of Discovery Period	September 10, 2021	150 days after End of Voluntary Negotiation Period
End of Discovery	November 9, 2021	60 days after deadline for Non-Settling Parties to file Written Direct Statements and Commencement of Discovery Period

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<sup>6</sup> Joint Movants propose that Case Event dates falling on a Saturday, Sunday, or legal holiday be continued to the next day that is not a Saturday, Sunday, or legal holiday.

<b>Case Event</b>	<b>Date Set Forth in Case Scheduling Order</b>	<b>Proposed Date<sup>6</sup></b>
Settlement Conference period	December 27, 2021 – January 17, 2022	48 – 69 days after End of Discovery
Deadline to file Amended Written Direct Statements	November 24, 2021	15 days after End of Discovery
Deadline for Written Rebuttal Statements	December 27, 2021	33 days after Deadline to file Amended Written Direct Statements
Deadline for Joint Settlement Conference Report	January 18, 2022	22 days after Deadline for Written Rebuttal Statements
Hearing	TBD	TBD (No change)
Proposed Findings and Conclusions	TBD	TBD (No change)
Responsive Findings and Conclusions	TBD	TBD (No change)
Closing Arguments	TBD	TBD (No change)
Initial Determination	not later than December 16, 2022	No Deadline

# Proof of Delivery

I hereby certify that on Thursday, May 06, 2021, I provided a true and correct copy of the Expedited Joint Motion for Suspension of Voluntary Negotiation Period and Subsequent Case Events and Deadlines to the following:

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

SoundCloud Operations Inc., represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Signed: /s/ Lisa Zang